Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-1403

R. R. ROBINSON d/b/a DO-RITE
GROCERY AND MARKET,
Petitioner.

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

GOLDEN, POTTS,
BOECKMAN & WILSON
BY: Claude R. Wilson,
Jr.
BY: Hugh Corrigan, IV

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OF THE STATE OF TEXAS

The petitioner, R. R. Robinson d/b/a Do-Rite Grocery and Market, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Texas rendered in these proceedings on November 30, 1977.

OPINIONS BELOW

The decision of the Supreme Court of Texas appears at Appendix A. The opinion

of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin appears at Appendix B. The Supreme Court of Texas refused petitioner's Application for Writ of Error for no reversible error in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

JURISDICTION

The petitioner's Motion for Rehearing (Appendix C) of the decision of the Supreme Court of the State of Texas was overruled on January 4, 1978. See Appendix D. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Petitioner brought this lawsuit in

February of 1976 against the Comptroller of Public Accounts of the State of Texas to enjoin the collection of sales taxes in excess of $20,800 claimed due the State of Texas and the City of Dallas, Texas. The questions thereby arising are:

Whether a taxpayer of the State of Texas must be forced to pay an alleged illegal and invalid tax assessment prior to the time he is entitled to judicial review of a final agency decision by the Texas Comptroller of Public Accounts' Office.

And, whether, in light of the taxpayer's financial condition, forcing him to come up with the tax deficiency as an absolute prerequisite to such judicial review affords him any remedy under the law and is consistent with the due process clause of the Fourteenth Amendment. to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States,

Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF FACTS

The facts relevant to this question by this petition are uncontroverted and therefore may be introduced to this Court in a summary fashion.

The petitioner, R. R. Robinson, operates the Do-Rite Grocery and Market, a small neighborhood grocery store, in Dallas, Texas. This case has its origin in a deficiency in excess of $20,000 plus penalties and interest assessed against the petitioner by the Comptroller of Public Accounts for uncollected sales taxes on the sale of beer. The deficiency was assessed over the petitioner's objection and

assertion that the sales of beer are exempt from the Texas Sales Excise and Use Tax under an exemption existing for food and food products for human consumption (Appendix G).

After exhausting the available administrative remedies, petitioner filed suit in the 53rd District Court of Travis County, Texas to appeal the agency decision on non-applicability of the statutory exemption and enjoin the respondent from collection thereof pending the appeal because the collection of such a substantial amount from the petitioner would destroy his business, ruin him financially and inflict loss for which he would have no adequate remedy at law. The district court granted the Comptroller's Motion for Summary Judgment and dismissed the petitioner's cause of action for lack of jurisdiction because the petitioner had not complied with the

requirements of the "protest statute", Article 1.05 (attached Appendix E) and Article 1.06 (attached Appendix F), Tex. Tax-Gen. Ann., by paying the entire tax deficiency prior to seeking judicial review and before any injunction could be issued. The Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin affirmed the dismissal of the judgment of the district court for taxes, penalties and interest.

On appeal to the Supreme Court of the State of Texas, the petitioner's Application for Writ of Error was refused; no reversible error (Appendix A). Petitioner's Motion for Rehearing was overruled by the Supreme Court on January 4, 1978. Petitioner now owes in excess of $22,000 exclusive of penalties and interest accruing under the lower court judgment, which under the Supreme Court's holding, will have to

be paid prior to the time he can obtain judicial review of the agency determination of non-applicability of the statutory exemption and is able to enjoin collection of the tax.

The petitioner's sales tax permit has been suspended and on March 24, 1978, the petitioner was served with a lawsuit filed by the State of Texas and the City of Dallas for the deficiency plus penalties and interest and an injunction against petitioner making any taxable sales within the State of Texas until such time as he shall file a bond, file all returns due and pay the deficiency along with penalties and interest due.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the due process principles enunciated in this Court's Osborn ruling.

In Osborn v. Bank of United States, 9 Wheat 738, this Court laid down the rule that an injunction is a proper remedy against a tax on property which is by law exempted from taxation. That rule has been recognized by later rulings of this Court (United States v. Rickert, 188 U.S. 432) and the Texas Supreme Court has also recognized the rule. Davis v. Burnett, 77 Tex. 3.

Petitioner recognizes that the mere illegality of the tax because it is assessed against tax exempt property does not per se justify the issuance of an injunction against collection of the tax, in the absence of some other element, such as inadequacy of legal remedy, irreparable injury, cloud on title or multiplicity of suits, presenting a case for the exercise of equity jurisdiction. Indiana Manufacturing Company v. Coehne, 188 U.S. 681; Bank of Kentucky v. Stone, 88 Fed. 383,

affirmed 174 U.S. 799.

However, it is equally well settled that when there exists some element in addition to the illegality of the tax, such as inadequacy of a legal remedy and irreparable injury, that equity will grant an injunction against a tax on property which is exempt from taxation. In petitioner's case, he has no adequate remedy under the law and will suffer irreparable injury if the Comptroller of Public Accounts of the State of Texas is not enjoined from collecting the tax deficiency prior to the time a determination can be made on the merits of the claim that the subject property is exempt from taxation by statute.

The newspaper article which is attached to petitioner's Motion for Rehearing (Appendix C) depicts the plight the petitioner is in; namely, that he is a sixty-five (65) year old proprietor of a small

(50 x 25 wooden frame building) neighborhood grocery store without funds to pay this tax. Article 1.06 (Appendix F) requires payment prior to an injunction and later judicial review of the agency decision. To come up with the deficiency would impose a severe hardship on the petitioner. He does not have the funds to pay this alleged deficiency, nor is he in a position to borrow the funds for said purpose.

He is in an especially serious position now because of the suit filed by the State of Texas on March 15, 1978 for the entire deficiency plus penalties and interest and an injunction against petitioner from making any taxable sales within the State of Texas until such time as he files a bond, files all returns due and pays the deficiency along with penalties and interest due. Collection of the tax in this

manner would destroy the taxpayer's business and would have the effect of an uncompensated expense, loss and injury for the recoupment of which the petitioner would have no remedy at law. Therefore, if he cannot pay a tax he asserts he is exempt from, he cannot avail himself of a suit for a refund as a remedy to test the legality of the assessment. Thus, in the most practical sense, there is no remedy at law and the circumstances justify an injunction against collection of the tax until liability for the taxes is finally determined. Petitioner in this case is aware of the prohibition in 28 U.S.C. §1341 that federal court shall not restrain the assessment of any tax where a plain, speedy and efficient remedy may be had in the courts of a state. However, the petitioner emphasizes that this is a case where there is no plain, speedy and efficient remedy

in the courts of the State of Texas, and only federal law can now protect the taxpayer by enjoining the collection of the tax involved pending determination on the merits of the taxpayer's claim that the property is statutorily-exempt from taxation.

As in nearly all cases in which an injunction is sought against taxation on the ground that the property is exempted from such tax, the principal ground of dispute is whether or not the property is exempt. The doubt and difficulty in reaching a determination of this question should not deter a court of equity from inquiring into it. In numerous cases in which injunctions have been granted, courts have entered into a consideration of and have determined whether or not the property in question was exempt from taxation. Tomlinson v. Branch, 15 Wall. 460; Union

Pacific Railway Company v. McShane, 22 Wall. 444; United States v. Rickert, 188 U.S. 432. In the case at hand, an exemption exists within the Texas Sales and Use Tax for food and food products for human consumption (Appendix G). The petitioner in this case claimed that his case fell under the food exemption at all administrative legal hearings. To require payment as a condition precedent is to presuppose, first, that the exemption is not applicable and, second, that the tax is due and owing. Under these circumstances, payment as a condition precedent ignores the fundamental and erroneous assumption of the non-applicability of the exemption. The exemption plainly exists under the Texas law, and if it applies to the sales of beer as petitioner asserts, then to review means the petitioner has been forced to forfeit everything to gain nothing. It would essentially be ab-

solute, the same as that which would result from a like judgment rendered upon the facts assumed.

2. The decision below conflicts with due process principles enunciated in this Court's Central of Georgia Railway Company ruling.

In Central of Georgia Railway Company v. Wright, 207 U.S. 127, this Court held that due process of law requires that, after such notice as may be appropriate, a taxpayer have opportunity before an impartial tribunal to be heard as to the validity of a tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed. See also Turner v. Wade, 254 U.S. 64; McGregor v. Hogan, 263 U.S. 234.

The administrative hearings at which the determination of a deficiency was

assessed against the petitioner can hardly be called fair and impartial tribunals. These administrative hearings are conducted by the Legal Services Division of the Comptroller of Public Accounts' Office. The Hearings Examiner acts as a judge and prepares a final order for the Comptroller's signature. The examiners alternate roles as prosecutors and defenders in different cases before the agency. Whatever hope this petitioner had of getting his case considered by an independent and impartial tribunal is now in the hands of this Honorable Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Texas in finding no reversible error in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Respectfully submitted,

GOLDEN, POTTS, BOECKMAN & WILSON

BY: Claude R. Wilson, Jr.

BY: Hugh Corrigan, IV

2300 Republic National Bank Tower
Dallas, Texas 75201
(214) 742-8422

COUNSEL FOR PETITIONER

March 31, 1978

PROOF OF SERVICE

I, Hugh Corrigan, IV, a member of the firm of Golden, Potts, Boeckman & Wilson, attorneys of record for R. R. Robinson d/b/a Do-Rite Grocery and Market, Petitioner herein, depose and say that on the 31st day of March, 1978, I served a copy of the foregoing Petition for a Writ of Certiorari

to the Supreme Court of the United States on Respondent herein by mailing three (3) copies of same in a duly addressed envelope to the Hon. R. L. Lattimore, Assistant Attorney General, Post Office Box 12548, Capitol Station, Austin, Texas 78711, by United States Mail, Certified, Return Receipt Requested, with the correct postage affixed thereto.

Hugh Corrigan, IV

SUBSCRIBED AND SWORN TO BEFORE ME at Dallas, Texas, this 31st day of March, 1978.

Elaine M. Peterson
Notary Public in and
for Dallas County, Texas

My Commission Expires:
June 6, 1978

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Nov. 30, 1977

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of ROBINSON v. BULLOCK, No. B-6978 was this day refused. No reversible error. (Both applications)

Very truly yours,

GARSON R. JACKSON,
Clerk

APPENDIX A

IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

JUDGMENT

12,549--R. R. ROBINSON, d/b/a DO-RITE GROCERY AND MARKET V. BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS

APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY

AFFIRMED IN PART AND IN PART REVERSED AND REMANDED -

Opinion by Associate Justice O'Quinn

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment EXCEPT as to appellee's cross action; it is THERE-

APPENDIX B

FORE considered, adjudged and ordered that the judgment is affirmed insofar as it finds the court without jurisdiction to hear and decide the merits of appellant's cause of action, and that part of the judgment with respect to summary judgment granted on the Comptroller's motion, is reversed and the cause, as to the cross action, is remanded for further proceedings consistent with the opinion of this Court. It is FURTHER ordered that appellant, R. R. Robinson, as principal, and United Pacific Insurance Company, of 411 North Akard, Dallas, Texas, as surety on the appeal bond herein, pay one-half of all costs in this behalf expended and that appellee, Bob Bullock, Comptroller of Public

Accounts, pay one-half of such costs, and that this decision be certified below for observance.

DATE: June 15, 1977

NO. B-6978

IN THE

SUPREME COURT OF TEXAS

* * * * * * * * * * *

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS,
PETITIONER

VS.

R. R. ROBINSON DBA DO-RITE
GROCERY AND MARKET,
RESPONDENT

* * * * * * * * * * *

MOTION FOR REHEARING

* * * * * * * * * * *

GOLDEN, POTTS,
BOECKMAN & WILSON

By: Claude R. Wilson,
Jr.

Hugh Corrigan, IV

2300 Republic National
Bank Tower
Dallas, Texas 75201
(214) 742-8422

COUNSEL FOR RESPONDENT

NO. B-6978

IN THE

SUPREME COURT OF TEXAS

****

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS,
PETITIONER

VS.

R. R. ROBINSON DBA DO-RITE
GROCERY AND MARKET,
RESPONDENT

****

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COMES Respondent, R. R. Robinson DBA Do-Rite Grocery and Market and moves the court to rehear and reconsider its order of November 30, 1977 refusing, n.r.e., Respondent's Application for Writ of Error and as grounds therefore would respectfully show the following:

I.

The action of this court in refusing to grant Respondent's Application for Writ of Error leaves standing a court of Civil Appeals decision which holds that a taxpayer has no right to judicial review of a determination of a tax deficiency without first paying the tax.

Such a decision denies the Respondent due process of law under the 5th and 14th Amendments to the United States Constitution and under Article 1, Section 19 of the Texas Constitution. Republic Ins. Co. v. Highland Park Independent School Dist. 171 S.W.2d 342 (Tex. Comm'n App. 1943, opinion adopted); Central of Georgia Railway Company v. William A. Wright 207 U. S. 127, 52 L. ed. 134. This means that any auditor of the Comptroller's Office can determine that a citizen of this state owes taxes and the citizen cannot question this auditor's

judgment without first paying those taxes. This is an especially serious proposition under the Texas Sales and Use Tax law which is involved in the present case because of the power given to the Comptroller to seize and sell a taxpayer's property to satisfy a sales tax liability without every having to go to court.

While on first impression it might appear that Respondent would have the opportunity to litigate his rights upon remand of this case back to the trial court without first paying the tax, this is not the case. As can be seen by the newspaper article attached hereto as Exhibit "A", the Comptroller's Office and the Attorney General's Office have publicly announced that they intend to collect this tax prior to the trial of this case on remand.

Respondent does not have the funds to pay this tax nor is Respondent in a posi-

tion to borrow funds for said purpose. If this Motion for Rehearing is not granted, Respondent's business will be seized and sold for payment of these taxes without Respondent ever having been given a hearing in court.

The only hearing which the Respondent has received was in the legal division of the Comptroller's Office where the attorneys on a daily basis alternate being prosecutor and hearings examiner.

If there is any question in the court's mind that such a hearing did not fulfill the constitutional requirement of due process, Respondent would request the court to remand the case to the trial court for a hearing on the matter before the Comptroller is released to seize and sell Respondent's property.

WHEREFORE, Respondent prays that the court reconsider its order refusing, n.r.e.,

Respondent, R. R. Robinson's Application for Writ of Error and enter an order granting same as therein prayed.

Respectfully submitted,

GOLDEN, POTTS, BOECKMAN & WILSON

/s/ Claude R. Wilson, Jr.
Claude R. Wilson, Jr.

/s/ Hugh Corrigan, IV
Hugh Corrigan, IV

2300 Republic National Bank Tower
Dallas, Texas 75201
Telephone: (214) 742-8422

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing was mailed by United States mail, certified, return receipt requested to Hon. R. L. Lattimore, Assistant Attorney

General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, with correct postage affixed thereto, on this the 14th day of December, 1977.

/s/ Hugh Corrigan, IV
Hugh Corrigan, IV

EXHIBIT A

SMALL GROCERY CAUGHT IN CATCH-22

The taxman says R.R. "Rocky" Robinson and his Do-Rite Grocery done wrong.

The attorney general says Rocky's got to pay a tax before he can find out if he owes a tax.

Rocky, meanwhile, says beer is food.

For years, Robinson, 65, collected no sales tax on beer sales at his store on South Lamar, believing the beverage was a foodstuff - just like Moon pies and eggs, and Wonder Bread -- and therefore exempt from the state sales tax law.

Until 1975, he encountered no problems. Beer was specifically immune to the state law. But the state legislature removed the beer exemption in 1969, and when Bob Bullock assumed the state comptroller's job, he ordered Robinson to ante up on back sales taxes totaling $20,800.

Employing a statute of limitations provision regarding sales tax collection, Bullock held Robinson responsible for $16,441 in state taxes and $4,447 in city taxes dating from Oct. 1, 1969 through March 31, 1975.

Robinson sued, claiming the tax was unauthorized. The Court for Civil Appeals ruled that Robinson must pay the taxes and threw out his suit without considering his argument that beer is exempt from sales taxes. More significantly, it ruled that he failed to follow proper procedure that requires that taxes be paid under written protest; in other words, anyone wishing to challenge the validity of a tax assessment must pay the tax before he can go to court.

Thursday, Robinson received another blow, one that may have signaled the final days of his 20-year ownership of the Do-Rite, a 50-by-25 foot wooden frame neighborhood store. The state supreme court refused to

grant him a review of the appeals court ruling. It referred the case back to the trial court for action on Bullock's counter suit for back taxes. There, the pedigree of beer will be established.

"I haven't got that kind of money," the stocky Robinson said hours after the decision, perching himself on a stool and folding his arms in pensive dejection. "I'm definitely in trouble. I'm just a little bitty operation. No way I can rake up $20,000. If I have to pay the taxes, I'll probably have to go out of business."

What happens in the case of Rocky Robinson may ultimately affect the appeal procedure used by taxpayers who feel they have been slapped with an unfair levy.

"This case is extremely important to the state," says Martha Smiley, chief of the tax division in the Attorney General's office, "It ensures that taxpayers who are

challenging any kind of tax law will first have to pay the tax revenue before they can challenge it. Otherwise, the tax money could be tied up for years waiting for the outcome of the challenge. The state could be without that revenue.

"There are millions of dollars challenged in the courts each year for all kinds of taxes. If the decision had gone the other way, I think it could have impeded the state's ability to secure tax revenues and it may have proliferated litigation. A person could avoid paying taxes for several years by bringing a lawsuit."

Robinson's attorney, Claude R. Wilson, Jr., said the decision seemed "pretty unfair."

"It can cause bad hardships on someone if tax collectors can assert that they (taxpayer) owe the tax before they can appear in court," Wilson said. "It may cause

them to have to liquidate their property just to get their day in court."

So it appears Robinson may have to pay the back taxes before he finds out whether he owes them.

"Unless he pays the money, I don't think there will be an answer to whether beer is a food or not," said Harriet Burke, assistant director of the hearings section of the Comptroller's Office. "I don think the case will be tried unless he pays. That would defeat the ruling of the court."

Should the case find its way back to trial court, Wilson said he will contend that beer complies with the sales tax law provision which exempt cereal and cereal products.

"We think beer is a cereal product because that's what it's made of," Wilson said.

Wilson said the Federal Trade Commission, the U.S. Dept. of Agriculture and the federal Dept. of Commerce have held "in several cases" that beer is a food. "Under the Texas Food, Drug and Cosmetic Act, beer would also be a food," Wilson said. "The act says food means articles used as food or drink for man."

Robinson's definition is more empirical. "I'm no authority, but I know beer has a food value. It has your grains and malts in it and it makes you fat."

Whatever the outcome (should Robinson pay under protest then win, he would be returned his money at 2 or 3 per cent interest), Robinson says, it all boils down to one think. He's in an inextricable mess. "It boils down to the fact that I'm 65 and I can't draw social security because I have the store," he says.

"I owe sales tax, they claim, that's

more than the store's worth. And I can't get out. I've got to stay in business just to pay my attorneys."

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

January 4, 1977

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of ROBINSON v. BULLOCK, No. B-6978 was this day overruled. (Both motions)

Very truly yours,

GARSON R. JACKSON,
Clerk

APPENDIX D

Art. 1.05 PAYMENT OF LICENSE OR PRIVILEGE TAXES UNDER PROTEST

(1) Protest. Any person, firm, or corporation who may be required to pay to the head of any department of the State Government any occupation, gross receipts, franchise, license or other privilege tax or fee, and who believes or contends that the same is unlawful and that such public official is not lawfully entitled to demand or collect the same shall, nevertheless, be required to pay such amount as such public official charged with the collection thereof may deem to be due the State, and shall be entitled to accompany such payment with a written protest, setting out fully and in detail each and every ground or reason why it is contended that such demand is unlawful or unauthorized.

APPENDIX E

Art. 1.06 INJUNCTIONS AGAINST COLLECTION OF EXCISE, OCCUPATION, AND CERTAIN OTHER TAXES, FEES AND PENALTIES

(1) Before any restraining order or injunction shall be granted in this State to restrain or enjoin the collection of any excise tax, occupation tax, sales tax, severance tax, gross receipts tax, license or permit tax, and registration or filing fee or any statutory penalties assessed for failure to pay any of such taxes and before any restraining order or injunction shall be granted against any state official or his authorized representatives in this State to restrain or enjoin the collection of any of the foregoing taxes, fees and penalties, the applicant therefor shall pay into the suspense account of the State Treasurer all taxes, fees and penalties then due by him to the State and the application for restraining order or injunction shall reflect said fact of payment

under oath of the applicant, his agent or attorney.

Art. 20.04 EXEMPTIONS

(L) Food and Food Products for Human Consumption. There are exempted from the taxes imposed by this Chapter the receipts from sales of, and the storage, use or other consumption of, food products for human consumption.

(1) "Food products" shall include, except as otherwise provided herein, but shall not be limited to, cereals and cereal products; milk and milk products, including ice cream; oleomargarine, meat and meat products; poultry and poultry products; fish and fish products; eggs and egg products; vegetables and vegetable products; fruit and fruit products; spices, condiments and salt; sugar and sugar products; coffee and coffee substitutes; tea, cocoa

products; or any combination of the above.

Supreme Court, U. S.
FILED
MAY 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

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* * *

NO. 77-1403

* * *

R. R. ROBINSON, dba DO-RITE GROCERY AND MARKET,

Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,

Respondent

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

MARTHA E. SMILEY
Assistant Attorney General
Chief, Taxation Division

ROBERT LEE LATTIMORE
Assistant Attorney General

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Austin, Texas 78711

Counsel For Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 77-1403

* * *

R. R. ROBINSON, dba DO-RITE
GROCERY AND MARKET,
Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS,
Respondent

* * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

Respondent, Bob Bullock, Comptroller of Public Accounts of the State of Texas, respectfully submits the following brief in opposition to the issuance of a writ of certiorari as prayed for by Petitioner.

QUESTIONS PRESENTED

Petitioner's contention is that he was denied due process in the State Court by reason of the State Tax Law requiring prepayment as prerequisite of judicial review failing to afford him an adequate remedy at law.

ARGUMENT

ADEQUATE STATE JUDICIAL REVIEW:

The issue presented by the taxpayer was resolved by this Court in GREAT LAKES DREDGE & DOCK CO. V. HUFFMAN, 319 U.S. 293, (1943). There this Court held that prepayment as a prerequisite to judicial review does not prevent application of 28 U.S.C., sec. 1341, which withholds relief in cases involving state tax administration when the state legislature has provided an adequate scheme whereby the taxpayer may maintain suit to challenge the state tax. BLAND V. McHANN, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966, SHEPHERD, INC., V. MONAGHAN, 256 F.2d 882 (5th Cir. 1958); STERLING SHOE CO. V. NORBERG, 411 F. Supp. 128. (D.C.R.I. 1976).

In the light of the prevailing Federal judicial policy of abstention from disturbing the jurisdiction of the state forums "out of scrupulous regard for the rightful independence of the state governments", Respondent points out that section (2) of Article 1.06, Tax.-Gen., Vernon's Texas Civil Statutes, allows the aggrieved taxpayer to file a *bond* in lieu of prepayment of the tax as a prerequisite for enjoining the collection of the tax. This less onerous provision of the "protest" statutes, does not appear in the Appendices to Petitioner's Petition, but same is shown as an appendix to this Opposition Brief. Thus, it is obvious that Petitioner at any time during the years of his operation of his store at an advantage over his competitors who paid their beer taxes, could have filed a bond and sought an injunction in the State Court against the collection of the taxes on the beer sold by him.

WAIVER OF DAY IN COURT:

The judgment which Petitioner seeks to have reviewed is shown on pages 19 - 21, as Appendix B of his Petition. In that case Petitioner brought suit to enjoin the State Comptroller from collecting taxes on his sales of beer, claiming that beer came under the food exemption of the sales tax law. Respondent Comptroller filed a counter claim in said suit for the tax delinquency and the trial court rendered a summary judgment dismissing Petitioner's cause of action because of non-compliance with the "protest" statutes, and granting Respondent Comptroller's counter claim for taxes. No summary judgment proof was submitted by Petitioner in opposition to Respondent Comptroller's counter claim. Upon appeal the dismissal was affirmed but the counter claim of the Comptroller was reversed and remanded to the trial court because of the failure of Respondent to attach the Certificate of delinquency to the Motion for Summary Judgment, although it was on file as an exhibit to the counter claim and was referred to in the Motion. After the issuance of the mandate, Respondent Comptroller amended his motion for summary judgment and presented it for hearing to the trial court. Although duly notified through his attorneys of record of such hearing, Petitioner again failed to offer any opposition to Respondent's motion, evidentiary or otherwise, other than filing at the last minute with the clerk but not calling same to the attention of the court or the Respondent Comptroller, a purported motion for stay of proceedings pending a request for stay to be presented to Justice Powell, and a proposed Petition for Certiorari to be filed with this Honorable Court. Thereupon, the trial court on the 30th day of March, 1978, granted Respondent Comptroller's Amended Motion for Summary Judgment on his counter claim for taxes.

In the meantime, the Respondent Comptroller instituted another suit against Petitioner to enjoin him from conducting a retail business without a valid sales tax permit. This is the lawsuit Petitioner refers to on Page 7 of his Petition. This suit was filed by an attorney in another section of the Texas Attorney General's Tax Division from the section that handled the cause here complained of by Petitioner, and, however worded, its legal effect can be only regulatory and punitive in nature. The aforesaid summary judgment of date March 30, 1978, has pre-emptive rights over Petitioner's tax delinquency to the extent covered thereby. Petitioner need not fear that the State of Texas will attempt to collect the same tax delinquencies twice.

From the foregoing, it is apparent that Petitioner Robinson, without even having to file a bond in compliance with the "protest" statutes, had two separate "days in court" in which to have this theory of tax exemption adjudicated by the State Court. He failed to take advantage of either occasion offered to him both of which were free of any burden of bond filing or prepayment of taxes. These shunned opportunities to have his exemption claim fully litigated seem to raise a question whether Respondent's real motive in this action is to impede the State's ability to secure the collection of its sales tax revenues rather than just to secure an exemption for the sale of beer.

NO STANDING TO COMPLAIN:

Another such free opportunity for litigation is now open to Petitioner by virtue of the aforesaid pending injunction suit. By a simple answer filed therein, without putting up bond or paying any money, he can force an adjudication of his exemption claim, if that is the real object of his Petition for writ of certiorari. While these waived opportunities to be heard might not be

definitive of the due process offered by a tax system, they surely should negate Petitioner standing to complain of "irreparable injury" with "no adequate remedy under the law". So, it appears that whatever hardship that Petitioner is now complaining of was brought about and continues because of his refusal to avail himself of the obvious legal remedies for obtaining his day in court, without denuding himself of his property, as fearfully voiced by his attorney, Mr. Claude R. Wilson, Jr., of Dallas, Texas (Appendix C of Petition, pp. 32-33).

CONCLUSION

For the foregoing reasons it is clear that Petitioner Robinson has suffered no deprivation of due process in the premises, and is without standing to complain of undue hardship cause by the sales tax law; therefore, writ of certiorari should not issue to review the judgment of the Supreme Court of Texas in this matter.

Respectfully submitted,

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PROOF OF SERVICE

I hereby depose and say that I am a member of the Bar of the United States Supreme Court and this ___ day of April, 1978, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioner R. R. Robinson by depositing the same in the United States Post Office addressed to the Hon. Hugh Corrigan, IV, one of his counsel of record, at his post office address, 2300 Republic National Bank Tower, Dallas, Texas, 75201 with Certified, Return Receipt Requested, first class postage prepaid.

R. L. LATTIMORE

Subscribed and sworn to before me in Austin, Travis County, Texas, this ___ day of April, 1978.

NOTARY PUBLIC, Travis
County Texas

My Commission
Expires:

APPENDIX

(2) Provided, however, that unless otherwise provided by Statute, said applicant may, in lieu of paying such taxes, fees and penalties into the suspense account of the State Treasurer, file with said Treasurer a good and sufficient *bond* to guarantee the payment of such taxes, fees and penalties in an amount equal to twice the amount of all taxes, fees and penalties then due and which may reasonably be expected to become due during the pendency of said injunction. The amount of such bond and the sureties thereon shall be approved by and acceptable to the judge of the court granting said injunction and the Attorney General of this State and the application for said restraining order or injunction shall reflect under oath of the applicant, his agent or attorney, that said bond has been approved and filed as aforesaid. Whenever it appears to the Attorney General that any such bond has become insufficient to cover double the amount of the taxes, fees and penalties accruing subsequent to the granting of said injunction, the said Attorney General shall demand of said applicant that additional bond be filed.